Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 24, 1998

Ms. Linda Wiegman
Supervising Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-0791

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 113461.

The Texas Department of Health (the "department") received a request for "surveys and complaint investigations performed at Texarkana Memorial Hospital d/b/a Wadley Regional Medical Center during 1995, specifically covering January through September 1995." You contend that section 552.101 of the Government Code, in conjunction with various state statutes and federal regulations, excepts portions of the requested documents from disclosure. We have considered the exception you claim and have reviewed the documents at issue.[1]

Initially, we note that some of the submitted documents are reports about the hospital's compliance with federal law as a Medicare provider. Federal regulations require the department to release the HCFA form 2567, statements of deficiencies and plans of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 (1988) at 5. It appears that the providers have had a reasonable opportunity to review and comment on the reports. We have marked some identifying

[1]The department failed to timely request an open records decision from this office. Gov't Code § 552.301. In most cases, failure to timely request a decision results in the legal presumption that the requested information is presumed to be open to the public and only the demonstration of a compelling interest can overcome the presumption. *See Hancock v. State Bd. Of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). However, the presumption of openness may be overcome when the requested information is deemed confidential by law. *See* Open Records Decision No. 150 (1977).

information that must be withheld from these reports. The remaining information in these reports must be released in accordance with federal regulations.

You ask several questions about the release of the HCFA forms in their entirety. We have previously answered your questions. In Open Records Letter No. 97-2843 (1997), we stated that federal law requires the department to release deidentified HCFA 2567 documents. Open Records Letter No. 97-2843 (1997) (*citing* Open Records Letter Nos. 1514 (1997), 1492 (1997), 1472 (1997), 1388 (1997), 1230 (1997)). We stated that in most instances, a patient's medical condition or diagnosis does not identify that patient when the name is redacted from the HCFA form. *Id.* We also found that because the federal provisions govern the public disclosure of the HCFA 2567 forms, the federal law prevails to the extent it may conflict with the Texas Medical Practice Act or other state statutes regarding information obtained from medical records. *Id. (citing English v. General Electric Co.*, 110 S.Ct. 2270, 2275 (1990) (state law preempted to extent it actually conflicts with federal law)). We also stated that the deidentification required by federal law is sufficient to protect the privacy interests of the patients. *See Star Telegram, Inc. v. Doe*, 915 S.W.2d 471, 474-475 (Tex. 1995). Accordingly, you must release the submitted HCFA forms after deleting information that identifies the persons specified in the regulations.

Section 552.101 excepts from required public disclosure information that is deemed confidential by law, including information made confidential by judicial decision. This exception applies to information made confidential by the common-law right to privacy. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.* In this case, common-law privacy protects from disclosure information that identifies the patients who have registered complaints against the hospital. We have marked the information that the department must withhold under section 552.101 in conjunction with the common-law right to privacy.

Section 5.08 the Medical Practice Act (the "MPA"), V.T.C.S. article 4495b, provides:

> (b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.
>
> (c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

V.T.C.S. art. 4495b, § 5.08. Section 5.08(j)(3) also requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 (1990) at 7. Thus, access to medical records is not governed by chapter 552 of the Government Code, but rather the MPA. Open Records Decision No. 598 (1991). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* V.T.C.S. art. 4495b § 5.08(a), (b), (c), (j); Open Records Decision Nos. 598 (1991), 546 (1990). We have marked the information in the submitted documents that is subject to the MPA. The department may only release this information in accordance with the MPA.

You contend that some of the records at issue are confidential under chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

> Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the records that are confidential under section 611.002(a). The department may release these records only as provided by sections 611.004 and 611.0045.

Section 161.032(a) of the Health and Safety Code makes confidential the "records and proceedings of a medical committee." "Medical committee" includes any committee of, among other entities, "hospital" and "an extended care facility." You raise section 161.032(a) for documents that appear to be the records of a quality assurance committee. We believe that you may withhold this information under section 161.032(a). We have marked the documents accordingly.

Subchapter G of Chapter 241 of the Health and Safety Code provides for the disclosure of health care information in the possession of hospitals. Section 241.152(a) of the Health and Safety Code provides that "a hospital or an agent or employee of a hospital may not disclose health care information about a patient to any person other than the patient without the written authorization of the patient or the patient's legally authorized representative." "Health care information" means "information recorded in any form or medium that identifies a patient and relates to the history, diagnosis, treatment, or prognosis of a patient." Health & Safety Code § 241.151(1). Section 241.153(3) provides for several instances in which a patient's health care information may be disclosed without the patient's written authorization. One such instance is if the disclosure is to "a federal, state, or local government agency or authority to the extent authorized or required by law." *Id.* § 241.153.(3). There is no provision which addresses the re-release of the health care information by the department. Therefore, we do not believe that section 241.152 is applicable in this instance. You may not withhold any information under section 241.152 of the Health and Safety Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,

Karen Hattaway

Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 113461

Enclosures: Marked documents

cc: Ms. Donna R. Kay, CLA
Nacol, Wortham and Associates, P.C.
12001 N. Central Expressway
Suite 800, LB-116
Dallas, Texas 75243
(w/o enclosures)